

IN SENATE OF THE UNITED STATES.

JANUARY 24, 1848.

Submitted, and ordered to be printed.

Mr. UPHAM made the following

REPORT:

*The Committee on Revolutionary Claims, to whom was referred the petition of the widow and heirs of Doctor Gustavus B. Horner, late a surgeon's mate in the army of the revolution, praying for the allowance of commutation pay, report:*

That they have had the same under consideration, and find that the subject has been repeatedly before Congress, and has received a very full consideration. At the second session of the 27th Congress, a very full and satisfactory report was made thereon to the Senate, (see Senate Doc. No. 160,) in which the committee on this occasion fully concur, and which they file as a part of this report.

They therefore recommend the following resolution:

*Resolved*, That the prayer of the petition be rejected.

IN SENATE OF THE UNITED STATES.—March 7, 1842.

*The Committee on Revolutionary Claims, to whom was referred the memorial of the heirs of Doctor Gustavus B. Horner, late a surgeon's mate in the army of the revolution, praying the allowance of commutation pay, report:*

That the memorialist presents a warrant to Doctor Horner, dated January 20, 1778, appointing him an hospital surgeon's mate in the army of the revolution, which is sufficient evidence of his appointment to that post.

To prove the length of his service he offers—

1. The certificate of George G. Brewer, of the land office in Maryland, stating that "the name of Gustavus Horner, a surgeon's mate, (hospital department,) appears upon the army ledger and a depreciation pay-roll; and that it appears that, on the 15th of May, 1781, he received £407 4s. 6d. depreciation pay. But how long he served does not appear by the documents in the land office."

2. The affidavit of William Horner, who states that Doctor Hor-

ner served between three and four years; he thinks nearly four years; that, according to witness's best recollection, he was in the service in the year 1781.

3. The testimony of Sarah Easton, who states that "about the close of the revolution, after the *battle* at Yorktown, she became acquainted with Doctor Gustavus B. Horner, who had recently returned from the army with Doctor William Brown." This is the substance of her testimony, although she adds some circumstances showing that her acquaintance with Dr. Horner was as late as above stated.

This is all the evidence in the case. The committee have already expressed their opinion that surgeon's mates were, under no circumstances, entitled to commutation, and have given the reasons of that opinion in their report upon the case of F. L. B. Goodwin, which is referred to.

If there be any difference between the case of Doctor Goodwin and that of Doctor Horner, the former is much the strongest in favor of the allowance of commutation. Doctor Goodwin was a *regimental* surgeon's mate. The resolutions of October, 1780, granting half pay for life, had no reference to any but regimental officers. It directed a reduction of the regiments, and gave the half pay to those who were deranged by the reduction, and also to those who remained and served to the end of the war. The argument in favor of the regimental surgeon's mate is that, being a regimental officer, he was subject to the reduction, and therefore came within the provision for half pay. But Doctor Horner was an hospital surgeon's mate, having no connexion with any regiment, and therefore not within the resolutions of October, 1780, at all. He belonged to the hospital and medical department, was appointed, not by Congress, but by the surgeon of the hospital, and held his office at the pleasure of that officer.

If he were entitled to half pay for life, it could be only under the resolution of January 17, 1781. But in this resolution surgeon's mates were omitted altogether. The reasons for that omission are suggested in the case of Doctor Goodwin, to which report the committee again refer.

The argument upon the resolution of January, 1781, has been, first, that the term *surgeons*, as there used, is generic, and includes all classes of surgeons; and secondly, that the omission of the surgeon's mate was an oversight.

Upon the first point, the committee have to remark that, among the many regulations on the subject of the medical department, which are numerous, the committee are able to find no instance in which the term *surgeons* has been used as including surgeons and mates. They have been treated throughout as distinct classes of officers, receiving different pay, and holding different rank; and in this resolution the term is applied, in the same sentence, to no less than three different grades of officers, with different adjuncts, as designating the different classes of medical officers. The resolution relates to none but that kind of officers, and adopts the term in a particular enumeration of the several grades.

But the most decisive consideration is, that this construction, which excludes surgeon's mates, was adopted by the Executive Departments, and uniformly adhered to, until the statute of limitation superseded the resolution itself, and put an end to its operation. No case can be found in which commutation has been allowed to a surgeon's mate, except by special act of Congress. This construction, by which a numerous class of officers were excluded, could not have escaped the attention of Congress at the time, more especially as application was frequently made to that body by various staff officers claiming commutation; yet Congress uniformly refused to extend the provision to any staff officer, except such as were named in the original resolutions. Had the term surgeons been used as generic, including both surgeons and mates, or had the omission of the latter occurred through inadvertence, it is incredible that Congress should not have passed a declaratory resolution in the one case, or supplied the omission in the other. The refusal to interfere with the construction given by the department, until the law had been fully executed and had ceased to operate, is, in the opinion of the committee, decisive.

But if even this difficulty is surmounted, and surgeon's mates are considered as entitled to half pay, under either the resolutions of October, 1780, or that of January, 1781, yet it remains to be shown that Doctor Horner was entitled to it. By the resolution of January 17, 1781, the half pay is given to certain officers of the hospital department and medical staff, who were then in service, and should "continue in service to the end of the war, or be reduced before that time as supernumeraries." This is the only resolution upon which, in any event, Doctor Horner could be entitled to half pay.

The evidence is by no means satisfactory that Doctor Horner was in service on the 17th of January, 1781. The proof of this fact rests upon the affidavit of William Horner, who evidently has no distinct recollection of the period of Doctor Horner's service. He says Doctor Horner served between three and four years; "he thinks nearly four years;" and that, according to witness's best recollection, he was in service in 1781. The witness does not state the fact positively, but doubtingly; and, in the opinion of the committee, such a statement would in no other case be deemed sufficient to sustain a claim upon the treasury. The testimony of Sarah Easton shows nothing in relation to the service.

But it does not appear that Doctor Horner served to the end of the war. Indeed, the testimony of William Horner shows the contrary. Doctor H. could not then be entitled to half pay on that ground.

The only remaining question then is, whether he became entitled as having been reduced as a supernumerary. This could not be, because then hospital surgeons' mates came within none of the reductions of the army. The tenure of their offices forbade it. They were appointed by the surgeons, continued so in their discretion so long as the necessities required, and dismissed by the surgeons at pleasure. They could not, therefore, be affected by the reduction of the army. This was not the case with the officers who are enu-

merated in the resolution of January, 1781, for at that time those officers were appointed by Congress; and this furnishes an additional reason why surgeons' mates were not included in the resolution itself.

After all, there is no sort of evidence how Doctor H. left the service. If he were a reduced officer, the fact should be shown. In the absence of all proof, it may fairly be presumed that he resigned. It is certainly the duty of the memorialist to prove all the facts necessary to establish his claim; and the omission to show how the service terminated, creates a presumption against him.

It does not appear that Doctor Horner ever claimed commutation in his lifetime, nor that such a claim was preferred by anybody until 1835, fifty-two years after the commutation was granted. A strong presumption arises from this delay, and the committee do not feel at liberty to presume the facts necessary to sustain the claim in the absence of proof.

In every view, therefore, in which this claim can be regarded, the committee are satisfied that it ought not to be allowed. They recommend the following resolution:

*Resolved*, That the prayer of the petition be rejected.